

SUPREME COURT OF THE STATE OF  
NEW YORK, COUNTY OF ALBANY

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In the Matter of the Application of  
The NEW YORK STATE COMMISSION  
ON JUDICIAL CONDUCT,

**AFFIRMATION IN  
REPLY**

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Petitioner,

Index No.: 8115-22

For an Order Pursuant to CPLR 2308 compelling  
compliance with a subpoena

RJI No.:

-against-

GREGORY PEIREZ, ESQ., and  
SHAWN SMITH, ESQ.,

Respondents.

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**ROBERT H. TEMBECKJIAN**, an attorney duly admitted to practice in  
the State of New York, hereby affirms and states the following to be true under the  
penalties of perjury:

1. I am the Administrator of the New York State Commission on  
Judicial Conduct ("Commission"), Petitioner in this proceeding, and am fully  
familiar with all the facts and circumstances set forth herein.
2. I make this affirmation in reply to Respondents' opposition to the  
Commission's petition for an order and judgment pursuant to CPLR 2308(b) and  
CPLR 411: (1) directing Respondents to appear at the Commission's office at

Corning Tower, Suite 2301, Empire State Plaza, Albany, New York, on a date set by the Commission not less than 10 days from the date of the court's order, to give testimony under oath and to produce copies of all emails in their possession from June 20, 2022, to July 1, 2022, between "gpeirez@[REDACTED]" and [REDACTED] and between "smithlaw9@[REDACTED]" and [REDACTED]; (2) sealing all court records in this proceeding pursuant to 22 NYCRR 216.1; and (3) granting such other and further relief as the Court may deem just and proper.

3. I also make this affirmation in opposition to Respondents' cross-motion to quash the Commission's subpoenas.

4. Respondents' opposition to the Commission's subpoenas is premised on two mistaken assertions: (1) that the subpoenas at issue were issued by a referee in the context of a Commission hearing, and (2) that Respondents are not required to comply with a Commission subpoena unless the subject matter of the Commission's investigation is revealed to them, rather than to the Court.

**The Commission's Subpoenas Were Issued in Good Faith  
And the Materials Requested Are Reasonably Related to an  
Authorized Commission Investigation of a Judge.**

5. The subpoenas at issue here were not issued by a Referee in connection with a hearing upon a Formal Written Complaint. Rather, they were issued by the Commission Administrator pursuant to Sections 42 (1) and 44 (1) of

the Judiciary Law in furtherance of an investigation as to whether judicial misconduct has occurred. Because the Commission has not authorized a Formal Written Complaint or appointed a referee, counsel's citations to Judiciary Law §§ 43 (2) and 44 (4), to 22 NYCRR 7000.6 and to case law interpreting those provisions are inapposite. *See* Affirmation of Michelle A. Storm ("Storm Aff."), at ¶¶ 6 – 8, 17.

6. At this early stage, both "the [Judiciary Law] and [the] Constitution give the commission broad power to inquire into the conduct of a Judge." *Nicholson v. State Com. on Judicial Conduct*, 50 N.Y.2d 597, 611 (1980). "To sustain the subpoenas, the commission need only make a preliminary showing that the information sought is reasonably related to a proper subject of inquiry." *Id.* *See also, Matter of Doe*, 61 NY2d 56, 60 (1983).

7. Respondents concede that the Commission is "engaged in a meaningful investigation," Storm Aff. ¶ 25, and that concession is dispositive. As the *Nicholson* Court held, "[q]uite simply, so long as the commission, in good faith, is investigating the conduct of a Judge, the commission is acting within the scope of its authority and a subpoena issued pursuant thereto is not subject to challenge." *Id.*

8. The Commission has more than satisfied the "good faith" and "reasonably related" standard here. As set forth more fully in my October 21,

2022, *in camera* affidavit, the full Commission has authorized an investigation into specific allegations that a judge engaged in, *inter alia*, improper communications. The Commission has specific evidence that the emails we have subpoenaed from Messrs. Peirez and Smith are reasonably related to its investigation. That is all the Commission needs to establish to support the subpoenas here.<sup>1</sup>

9. Should the Court have any questions about the *in camera* material, Commission counsel is prepared to address any concerns in an *in camera* oral presentation on the day of argument.

**The Commission's Subpoenas Are Sufficiently Narrowly Tailored to Elicit Relevant Evidence Without Undue Burden to Respondents.**

10. Contrary to Respondents' arguments, the Commission's subpoena is not an "unfettered" inquiry, Storm Aff. ¶ 14; Smith Aff. ¶¶ 7, 8, and does not request "unlimited access" to a "private email account." Smith Aff. ¶ 8.

11. To the contrary, the subpoenaed records consist of emails between Respondents' respective [REDACTED] and [REDACTED] accounts and [REDACTED] from

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<sup>1</sup> Because the Administrator has proffered a specific factual basis for his issuance of these subpoenas, Respondents' reliance on *Matter of New York City Dept. of Investigation v. Passannante*, 148 A.D.2d 101, 104 (1st Dept., 1989) and *Temporary Com. of Investigation v. French*, 68 A.D.2d 681, 691 (1st Dept., 1979), Storm Aff. at ¶16, is misplaced.

June 20, 2022, to July 1, 2022, a period of less than two weeks. That targeted request is hardly “unfettered” or a request for “unlimited access.”<sup>2</sup>

12. Neither of the Respondents nor their counsel has made any claim that producing this limited number of emails is unduly burdensome or unreasonably time consuming.

13. Nor has either Respondent or counsel claimed that the requested emails or their related testimony are protected by attorney-client privilege or are shielded from disclosure by any legally cognizable protection for medical records, sealed criminal records, whistleblower complaints, or the like.

14. To the extent Mr. Smith is arguing that he has some privacy right in withholding the subpoenaed emails, Smith Aff. ¶ 8, he has failed to offer a single example of a “private” email and the legal basis that would shield it from disclosure. I note that Mr. Peirez has not submitted any affirmation at all, thus abandoning any claim that his emails are in any way privileged.

15. Finally, Respondents’ argument that they need additional information about the subject of the Commission’s investigation in order to prepare for their testimony, Storm Aff. ¶ 25; Smith Aff. ¶ 6, is without merit. Respondents need

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<sup>2</sup> Respondent Smith’s claim that Commission staff advised him that the Commission has “unlimited access to subpoena any and all private emails from [his] account,” Smith Aff. ¶ 8, is, at best, a gross mischaracterization. Submitted herewith are the affirmations of Commission staff attorney Shruti Joshi and Commission Investigator Ryan Fitzpatrick detailing their accounts of their communications with Respondent Smith.

only review the limited number of emails that they produce pursuant to the subpoenas.

**Respondents Are Not Entitled to Notice of the Subject of the Commission’s Investigation.**

16. There simply is no legal basis for Respondents’ assertion that the Commission is obliged to reveal the subject matter of its investigation. Storm Aff. ¶¶ 24-25.

17. In fact, the opposite is true: pursuant to the plain language of the Judiciary Law and a well-established body of case law, the Commission need not and cannot reveal the subject matter of an investigation to a witness who is not the judge under investigation, unless the matter otherwise has been made public by circumstances that are not present here.<sup>3</sup> See Tembeckjian October 21, 2022, Aff., ¶¶16-17.

18. Contrary to Respondents’ counsel’s argument, Storm Aff. ¶ 23, disclosing the subject matter of the Commission’s investigation beyond what has already been disclosed would violate Judiciary Law § 45. Counsel concedes that the Commission has already disclosed that the subject of its investigation is “inappropriate email correspondence.” Storm Aff. ¶ 28. The subpoenas themselves

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<sup>3</sup> As set forth in the Tembeckjian Aff., Commission proceedings must remain confidential unless otherwise made public by operation of law, *i.e.* when the Commission renders discipline pursuant to Judiciary Law Section 44(7) or when the judge under inquiry waives confidentiality under Judiciary Law Sections 44(4) or 45. Such circumstances not present here. See Tembeckjian October 21, 2022, Aff., ¶20.

disclose specific email addresses and a specific time period. Yet counsel argues that Respondents are entitled to broader disclosure so that *they* might decide which of their subpoenaed emails are relevant. Storm Aff. ¶ 25. Putting aside that in the context of the instant proceeding, it is for this Court, and not the Respondent, to decide what is relevant, in the course of its investigation, the Commission could not give Respondents the additional witness and documentary evidence in our possession necessary for them to decide relevance, without compromising our investigation and violating Section 45.

19. In addition, the confidentiality provisions of Section 45 are intended to do more than simply protect the reputation of a judge under investigation. As the Court of Appeals recognized in *Stern v. Morgenthau*, 62 N.Y.2d 331, 339 (1984), “[t]he classic formulation of the necessity for the confidentiality of Grand Jury proceedings ... applies with equal force to the Commission’s proceedings.” *Id.*

20. In particular, the confidentiality of Commission proceedings is “important to ... protect against subornation and perjury by witnesses, ... assure the confidentiality of witnesses ... [and] protect the standards of the judicial system as a whole and to insure that none but qualified Judges remain a part of it.” *Id.*

21. Revealing details of the Commission’s investigation to a witness prior to taking his or her testimony poses a real threat to the integrity of any investigation. For example, witnesses with prior knowledge of the subject of their testimony can compare notes, align their stories, and decide whether documentary evidence can be safely destroyed rather than produced.

22. I wish to make clear that I am not alleging that the Commission has any information that these Respondents have engaged or will engage in improper conduct. It is, however, a risk in every investigation and, as the *Morgenthau* court recognized, an important reason that the Commission’s investigatory materials must remain confidential. *See e.g. Matter of Marshall*, 8 NY3d 741 (2007) (judge removed for, *inter alia*, tampering with evidence during a Commission investigation).

**Public Policy Mandates Respondents’ Compliance  
With the Commission’s Subpoenas.**

23. As the Court of Appeals observed in *Matter of New York State Commn. on Jud. Conduct v. Rubenstein*, 23 N.Y.3d 570, 581-582 (2014), “[c]ontinued public confidence in the judiciary is of singular importance, and can be furthered only by permitting the Commission access to information that allows it to quickly identify and respond to judicial misconduct, including criminal behavior, abuse of power, corruption, and other actions in violation of laws applicable to judges.”

24. Indeed, in every instance in which the Court of Appeals has balanced the Commission's need for information reasonably related to a misconduct investigation against other important public policy goals, the need to protect the integrity of the judiciary has taken precedence. *See Rubenstein, supra; Stern v Morgenthau*, 62 NY2d at 339 (Commission responsibility to "protect the integrity of the judiciary" "transcend[s]" a Grand Jury's criminal prosecution); *Nicholson*, 50 NY2d at 608 (chilling effects on First Amendment rights were "far outweighed" by State's interest in the integrity of the judiciary).

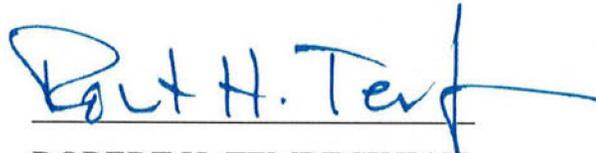
25. Respondents have not identified a compelling interest that would take priority over the Commission's duty to preempt and mitigate the potential consequences of allegations of judicial misconduct "by quickly and effectively investigating allegations of judicial misconduct." *Rubenstein*, 23 NY3d at 582.

26. As such, the Commission respectfully requests that the Court issue an Order denying Respondents' cross-motion to quash the subpoenas and compelling Respondents' compliance.

**WHEREFORE**, Petitioner respectfully requests that this Court issue an order and judgment pursuant to CPLR 2308(b) and CPLR 411: (1) directing Respondents pursuant to CPLR 2308(b) to appear at the Commission's office at Corning Tower, Suite 2301, Empire State Plaza, Albany, New York, on a date set by the Commission not less than 10 days from the date of the court's order, to give

testimony under oath and to produce copies of the subpoenaed e-mails; (2) sealing all court records in this proceeding pursuant to 22 NYCRR 216.1; and (3) granting such other and further relief as the Court may deem just and proper.

Dated: November 12, 2022  
Albany, New York



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